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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 29

KERR STEAMSHIP CO., et al.,
Petitioners,

v.

UNITED STATES OF AMERICA and
FEDERAL MARITIME COMMISSION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONERS

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In their supplemental memorandum of September, 1961, respondents call to the Court's attention the decision in *Moatship Lines, Limited, et al.* v. *Federal Maritime Board and United States* (D.C. Cir. June 30th, 1961), — App. D.C. —, — F. 2d —, Pike & Fischer Shipping Reg. Rep. 20100. Consideration of the petition herein apparently has been deferred pending the announcement of the District of Columbia Circuit decision in the *Moatship Cases*, where the same Federal Maritime Board Order was under review.

We cannot concur in the present suggestion of the respondents that consideration of the instant petition

be further deferred until the Federal Maritime Commission shall have completed its deliberations and taken action to correct the deficiency in the Order under review which moved the Court of Appeals for the District of Columbia Circuit to find it fatally defective and to vacate it. Since the announcement of the District of Columbia decision, Reorganization Plan No. 7 of 1961 (H. Doc. 187, 87th Cong., 1st Sess.; 1961 U.S. Code Cong. & Adm. News 2295, *et seq.*), has abolished the Federal Maritime Board, which issued the Order under review, and created the Federal Maritime Commission. The Commission is presently staffed by five Acting Commissioners serving under 90-day appointments (Reorganization Plan No. 7, §302, 1961 U.S. Code Cong. & Adm. News 2297). The President has nominated four of the five permanent Commissioners. Those named include only one of the Acting Commissioners. It is not yet known whether the permanent Commissioners will succeed the Acting Commissioners before the end of the 90-day period.

In view of the fluctuating status of the administrative agency, it is reasonable to assume that a considerable period will elapse before thoroughly considered action will be taken in conformity with the District of Columbia decision. Whether that action will in any way affect the petitioners is unpredictable. While the petitioners are, by the stay issued below, protected against enforcement of the Order pending final disposition of their petition, the issues involved are of great importance to the field of regulation of ocean carriers and, insofar as they include the Constitutional point on which the District of Columbia decision turned, are of importance to the procedures of Federal administrative agencies generally.

Apart from the questions as to the reach of §21 of the Shipping Act, 1916, as amended (46 U.S.C. §820), the instant petition raises the far broader question whether the decision of this Court in *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950), represents a real protection against the unfettered indulgence of administrative curiosity, or whether it is a high-sounding but empty promise of the interposition of the courts between the people and the potential oppressions of government — a promise to be honored in the breach rather than the observance.

We submit that the resolution of the questions presented, particularly in the presence of a conflict between decisions of the Courts of Appeals for the Second and District of Columbia Circuits, should not be further deferred pending the tortuous course of administrative deliberation.

Respectfully submitted,

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Dated: New York, N. Y.
October 3rd, 1961.